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No. 90-663

In The

Supreme Court of the United States

October Term, 1990

FREDERICK M. DEVER, JR.,
Petitioner,

versus

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUTY, OHIO

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the petitioner was denied his right of confrontation granted to him by the Sixth and Fourteenth Amendments of the Constitution of the United States by the admission of testimony, pursuant to Rule 803(4), Ohio Rules of Evidence, in petitioner's trial, over his objection, from a physician concerning statements made to that physician by a young child pertaining to sexual abuse and the identification of the alleged perpetrator, where there was no evidence of abuse or physical or emotional injury, no evidence of the child-declarant's motive in making statements, for which the evidence was that the child did not understand the purpose for questions and examination, resulting in no evidence before the trial court that the statements by the child possessed any indicia of reliability, established a particularized guarantee of trustworthiness, or met the firmly rooted purpose of a Rule 803(4) admission, in which the admission of that hearsay deprived petitioner of his rights under the Confrontation Clause.

PARTIES TO THE PROCEEDING BEFORE THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

The opinions below have been previously set forth at appendices A through D of the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court has been previously set forth at page 2 of the Petition for a Writ of Certiorari. This Court does have jurisdiction to consider and decide the interpretation of the Ohio Rules of Evidence to the extent that the construction and

application of those rules by the courts of Ohio are in conflict with the Confrontation Clause of the Sixth Amendment of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, sections of the Revised Code of Ohio, and Ohio Rules of Evidence involved in this case have been previously set forth at pages 2 and 3 and at appendices E through G of the Petition for a Writ of Certiorari.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The record reflects that Diane Potter's statement to the police was supplied to the social worker, but the record is silent as to Specialist Mike Wilson's discussions, directions and characterizations to that social worker. The record is further silent as to what transpired during a 30-to-40-minute interview of the child by a social worker in officer Wilson's presence and as to what transpired following the mother's departure from the examining room and the resumption of the questioning of the child by Ann Saluke, M.D. as those interviews would bear upon the respondent's obligation to establish an indicia of reliability and some guarantee of trustworthiness to the hearsay statements purported to have been made by the child to a physician and recited at trial.

REPLY TO RESPONDENT'S ARGUMENT

Idaho v. *Wright*, __ U.S. ___, 110 S.Ct. 3139, 3147 (1990), recognizes that the "medical treatment" exception to the hearsay exclusion codified in Evid.R. 803(4), Title 23, Revised Code of Ohio, provides an indicia of reliability sufficient to remove Confrontation Clause infirmity where the hearsay statement is admitted following

evidence establishing compliance with the rationale of the rule's firmly rooted purpose.

The issue addressed by petitioner is that to satisfy the Sixth Amendment of the United States Constitution in the admission of a young child's out-of-court statement to a physician, where the right to confront that child-witness is denied, there must be a showing by the proponent of the declaration that the child understood the purpose for the questions seeking the statement and was motivated to tell the truth for purposes of receiving medical treatment to satisfy the rationale underlying Evid.R. 803(4).

On this record, respondent totally failed to establish the state of mind and motivation of the child-declarant at the time that the statement was made. At page 202 of the record Dr. Saluke states: "[t]he social worker and I went into the room and Kristen and her mother were there and we had started to ask her questions about why she was there and she seemed to kind of jump from topic to topic and didn't really seem to be answering our questions and she kept looking to her mother and looking around the room and changing the subject and * * * [her mother suggested that she leave the room and she did]." Although Dr. Saluke stated the protocol, customary practice and typical approaches she utilized in interviewing children, she was asked by respondent at pages 200-201 of the record: "[d]id she -- to the best of your knowledge -- did she understand why she was being asked these questions?"; and Dr. Saluke responded: "I don't recall her specific response." No further information was developed by respondent bearing upon the child's understanding of, or purpose for, any questioning or examination or of the child's motivation to seek treatment.

The "'medical treatment' exceptions to the hearsay rule are based upon the belief that the persons making such statements are highly unlikely to lie." *Idaho* v. *Wright*, 110 S.Ct., at 3149. This belief may not be assumed but must require some evidence on the subject matter sufficient to establish an understanding and related motivation by the child to seek medical treatment and thereby be truthful at the time the statement was made. The record here

demonstrates total inability to ascribe an understanding, motivation, and related truthfulness of the child's statement to Dr. Saluke. Within the scope of Evid.R. 803(4) there was a failure by respondent to discharge its obligation to establish the purpose underlying the rule.

This Court in *Idaho* v. *Wright*, *supra*, at 3150, sets forth decisions from state and federal appellate courts concerning factors which relate to whether a child-declarant's statements in child sexual abuse cases are reliable. *See*, respondent's brief, pages 8 and 9. Spontaneity and consistent repetition by the child is absent from this record. The mental state and motivation of the child-declarant in this case was never established by respondent. The terminology used by petitioner's child of "pee pee," "mouth," "white stuff," "yucky taste," and "mashed potatoes with butter" is consistent with a four and one-half-year-old child's general knowledge which does not indicate that she utilized sexual terminology that was advanced for her years or experience. The record significantly establishes that there was no evidence of physical or emotional injury sustained by the child, no diagnosis of sexual abuse and no necessity for treatment.

The absence of confrontation between police and petitioner in the child's presence; petitioner's lack of knowledge of the child's examination; whether the police officer told petitioner's wife that there was a witness; that the report to the police was furnished by a neighbor; the absence of any characterization by the police officer to social workers or physicians of the sexual conduct suspected, except Ms. Potter's statement (see respondent's brief pages 9 and 10); are irrelevant factors which do not establish an indicia of reliability which can support a claimed trustworthiness of the child's statements to a physician for the admission of the statements pursuant to Evid.R. 803(4), or otherwise.

Dr. Saluke stated, or she was told by the social worker, that the child wanted to talk to a doctor. The child did not insist on speaking with a doctor. The child, although changing the subject, did not refuse to talk to the physician in her mother's presence. The

sole evidence present is during the physician's interview with the child she was unresponsive to questioning and the doctor didn't know whether the child understood the reason or purpose for questions and examination. This record fails to establish any factor which "relate[s] to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Idaho* v. *Wright, supra*, 3150. Respondent speculates that the child did not speak in her mother's presence, but did so afterwards, as a factor supporting reliance for the child's statement absent any information of what transpired or the child's motivation. Speculation does not discharge respondent's burden as the proponent for admission of the child's out-of-court statement.

Respondent's statement, page 9 of its brief, that during the period that the child was taken by officer Wilson to a social worker and physician, "they steered clear of the subject of child abuse" and "[t]here was no coaching" is incorrect.

First, pictures with marks placed upon them, including a "daddy picture", was presented to the child by a prosecutor at the competency hearing. The child recalled having seen the pictures before and of having placed marks upon them. That episode, which at the competency hearing was in the context of social-worker interview, is indicative that "they" did not "steer clear of the subject of child abuse" preparatory to the child's examination by the physician.

Second, page 211 of the record, Dr. Saluke stated that the child had been interviewed before her meeting with the child. Dr. Saluke, pages 214 and 215 of the record, further stated that before she spoke with the child she had been informed by social workers that petitioner was the alleged perpetrator and that the investigation was focused upon petitioner. Such an interview suggests that the topic discussed was sexual abuse.

Third, officer Wilson, pages 237-239, testified that he spoke with the child on October 23rd, transported her to the Hamilton County Human Services sexual abuse intervention team for an inter-

view of the child by social workers which lasted 30 to 40 minutes and which was conducted in the officer's presence. At page 254 and 255 the policeman testified that he presented all information obtained by the police, including the "Potter statement", preparatory to the social worker's interview of the child. Again, "they" did not "steer clear of the subject of child abuse." During a four-hour wait at the hospital to see Dr. Saluke, the policeman did not discuss the situation with the child and he stated he "steered clear" of the subject matter and did not coach or rehearse the child at that point, or during that time period. What happened to the child in interviews before she was questioned by Dr. Saluke was not presented by respondent at trial to support any claim of reliability and trustworthiness of the statements preparatory to their introduction; and speculation of what occurred during that episode and speculation as to what, if any, influence was related to the mother's presence in the examination room and her departure, does not comply with Confrontation Clause requirements to afford admission of the child's statements through Dr. Saluke.

Respondent misrepresents at page 9 of its brief that in the case *sub judice* the trial court's ruling of incompetency as a witness and subsequently altered by the Court of Appeals as an unavailable witness was explained by the appellate court upon a finding that the child was frightened in the courtroom setting. That statement is untrue. The trial court made no finding that the child was frightened in the courtroom and the Court of Appeals did not make such a finding. The only mentioning of a frightened child-witness by the Court of Appeals is in its discussion of, and quoting from, the factual backdrop of *State* v. *Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989). *See*, lower court opinion at page App. 8 of petitioner's appendix.

The child's statements at the competency hearing establish a clear recall of the period of the alleged offense: she went to a hospital at that time and spoke with doctors; she remembered the pictures presented to her at some point before meeting with Dr. Saluke; she recalled she had placed marks on those pictures but didn't know why she had marked the pictures; she identified a "daddy" picture; she

did not recall telling anyone that "white stuff" came from "daddy's pee pee", stating that it was bubbles but not from a penis; she stated that the location of the episode was the bathtub; and she had been asked by her father to count to 100 but counted to 11. Comparing the discussion of the child's testimony at pages 5 and 6 with the testimony of Ms. Potter at pages 7 and 8 of petitioner's Petition for a Writ of Certiorari, it cannot be concluded that the child testified to a lack of memory of the subject matter of her statement. Her testimony revealed that no offense was committed and that testimony was consistent with the time, place, counting and stating that it was not "white stuff" but bubbles with distinct similarity to the episode as recounted by the witness Potter.

Not only was petitioner precluded by the trial court in confronting the child at the competency hearing, but that examination by respondent exceeded the bounds of the determination of the child's competency and proceeded directly into the merits of the pending criminal prosecution. The child clearly recalled the events, was found to know the difference between truth and falsity, but because she did not state any sexual abuse the trial court found her to be incompetent to testify. The trial judge substituted incompetency for assumed incredibility where the child did not testify to the presence of a criminal act.

Petitioner was not afforded any opportunity at the competency hearing or at trial to examine —confront —the child. The opportunity for cross-examination was removed by the trial judge. *Cf.*, *Davis* v. *Alaska*, 415 U.S. 308 (1974). The questions directed to the child at the competency hearing in the course of this criminal prosecution was not limited and "directed solely to [the] child's ability to recollect and narrate facts, to her ability to distinguish between truth and falsehood, and to her sense of moral obligation to tell the truth." *Kentucky* v. *Stincer*, 482 U.S. 730, 747 (1987). Nor was the questioning in the competency hearing restricted to the Ohio standard: "[t]he essential test of the competency of an infant witness is his comprehension of the obligation to tell the truth and his intellectual capacity of observation, recollection, and communication." *State* v.

Workman, 14 Ohio App.3d 385, 471 N.E.2d 853, 859 (1984). *Cf.*, *Kentucky* v. *Stincer*, 482 U.S., at 739-746.

Petitioner's confrontational denial at the competency hearing coupled with the erroneous conclusion by the trial court of the child's incompetency, his denial of confrontation of the child-witness at trial, and the subsequent alteration by the Court of Appeals to that witness' unavailability harkens to a the failure of a good faith effort on the part of respondent to produce the declarant at trial to satisfy the first of the two-part constitutional standard announced by *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980). Cross-examination of the declarant in this case was much more than of marginal utility. *Idaho* v. *Wright*, 110 S.Ct., at 3150.

The burden was, and remains, upon respondent to produce evidence of what transpired with the child during the social-worker interview to remove questioned manipulation and coaching. Respondent was obligated to produce evidence that the child understood the purpose for questioning and examination by the physician and was motivated to tell the truth to obtain medical diagnoses and treatment to qualify the declarant's statements as within the purview of Evid.R. 803(4) rationale. If the mother's departure from the examination room was germane respondent failed to furnish any information to make it so. Silence, or speculation, on the subject does not satisfy respondent's burden for establishing an indicia of reliability and a particularized guarantee of trustworthiness for admission of the child-declarant's statements.

CONCLUSION

For the reasons set forth in the petition and this reply brief, certiorari should be granted.

Respectfully submitted,

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